



MAAP2014-P-1772-01

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APPELLANT'S BRIEF

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH COUNTY

APPEALS COURT NO.
2014-P-1772

COMMONWEALTH,
Appellant

VS.

KYLE JOHNSON,
Appellee

ON APPEAL FROM JUDGMENTS OF
THE BROCKTON SUPERIOR COURT

RECORD APPENDIX FOR THE COMMONWEALTH

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March 6, 2015

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ISSUE PRESENTED

I. Whether the judge was warranted in granting the defendant's motion to suppress where the judge erroneously deemed the victim's identification, which involved no state action, of the defendant from a single photograph shown to the victim by the victim's cousin, "especially suggestive" and therefore inadmissible at trial and tainting any subsequent identifications?

STATEMENT OF THE CASE

On March 11, 2013, the defendant was indicted by a Plymouth County grand jury for unlawful possession of a firearm, unlawful possession of ammunition without an FID card, unlawful possession of a loaded firearm, unlawful discharge a firearm within 500 feet of a building, assault and battery with a dangerous weapon (gun), breaking and entering in the daytime (person in fear), and armed assault in a dwelling. (R3,7-13)¹. The defendant was arraigned on April 2, 2013 and bail was set at \$150,000.00 cash without prejudice. (R3). On May 13, 2013, the pre-trial conference report was filed. (R3).

¹ The one volume transcript of the motion hearing will be cited as (MH__). The Commonwealth's record appendix will be cited as (R__).

From June 13, 2013 through September 13, 2013, the parties filed various discovery and evidentiary motions. (R3-4). On October 30, 2013, the defendant filed a motion to suppress identification. (R4). After a series of continuances, Judge Moriarty conducted an evidentiary hearing on the motion on May 8, 2014. (R4). He took the matter under advisement. (R4). On May 16, 2014, Judge Moriarty issued a memorandum of decision allowing the defendant's motion to suppress. (R4).

On May 23, 2014, the Commonwealth filed a motion for reconsideration. (R5). On May 28, 2014, Judge Moriarty denied the Commonwealth's motion. (R5). On June 6, 2014, the Commonwealth filed a notice of interlocutory appeal and an application with the Single Justice. (R5). On July 3, 2014, the Single Justice allowed the Commonwealth's application for interlocutory appeal. (R5). The case was entered on the Appeals Court's docket on November 14, 2014. (R5).

On November 26, 2014, the defendant filed a motion to reduce bail pending resolution of the Commonwealth's appeal. (R5). On December 1, 2014, Judge Cannone granted the defendant's motion and the

bail was reduced to \$10,000.00 cash without prejudice with conditions. (R5).

STATEMENT OF THE FACTS

Hearing on the motion to suppress

Detective Jacqueline Congdon had been a Brockton Police officer for eighteen years and a detective for fourteen years. (MH10). On September 21, 2012, the victim, Mr. Adebayo Talabi, received a telephone call from his upstairs neighbor that the door to the victim's apartment was open. (MH7,11,12,15;R16-17). The victim went home and found a man inside whom he did not know or recognize. (MH11;R17). The two men fought. (MH11;R17). After the intruder's gun went off, the intruder ran away. (MH11;R17). The victim described the man to the police as a light-skinned black male wearing a gray hooded sweatshirt. (MH11;R17).

Detective Congdon asked the victim if he wanted to come to the police station to view booking photographs. (MH12;R17). The victim did not do so. (MH12;R17). On September 27, 2012, the victim called the police station and reached Officer Scott Besarick. (MH12;R17). Officer Besarick called Detective Congdon and told her that Mr. Talabi was on the phone and Mr.

Talabi had said that he now knew who the man was who had been in his home. (MH13;R17). Officer Besarick asked whether he could transfer the call to Detective Congdon, and the detective then spoke to the victim. (MH13).

The victim told her that he had been speaking to his cousin, Mr. T.J. Hendrick, over the weekend. (MH13;R17). Mr. Hendrick told him that Mr. Hendrick's home in Roxbury had broken into on September 20, 2012, which was the day before the break-in at Mr. Talabi's home. (MH13;R17). Mr. Talabi then set up a conference call with the officer and his cousin. (MH13;R17 and n.2).

Mr. Hendrick said he saw a neighbor's video surveillance tape of Mr. Hendrick's house on September 20. (MH13;R17). Mr. Hendrick recognized "from the size and shape" of the robber that he might be their cousin Jante Hendrick's boyfriend. (MH13;R17). Mr. Hendrick's mother had taken photographs at a cookout at Mr. Hendrick's house that summer of Jante and the defendant. (MH17;R17). Mr. Hendrick's mother forwarded a photo of Jante and the defendant to Mr. Hendrick. (MH17-18;R17). Mr. Hendrick then forwarded that photograph to the victim. (MH18;R17). Mr.

Hendrick never said more than he thought it might have been Kyle Johnson. (MH17). The victim told Detective Congdon after he viewed that photograph that this was the male he had fought with in his home. (MH18;R17). Detective Congdon then prepared an eight-person photo array which included a photograph of the defendant. (MH16;R17).

Detective Congdon did not get a copy of the videotape. (MH14;R17). She did obtain a copy of the police report from the Roxbury police. (MH14). There is no indication on the record that she obtained a copy of the cookout photograph. The police report did not contain the name Kyle Johnson anywhere and it referred to the offender as "unknown." (MH14-15). Detective Congdon had no knowledge of Mr. Hendrick's photograph of the defendant or its transmission to the victim until the victim called her. (MH18). She was not present when Detective Hyland showed the photo array to the victim. (MH16).

Detective Thomas Hyland has been a Brockton Police officer for fifteen years. (MH7). On September 28, 2012, he met the victim at the Papa Gino's on Crescent Street. (MH7,15;R18). The detective read a Witness Instruction Form aloud to the

victim, and then presented him with an eight-person photo array with the photographs on one page.

(MH8;R18).

The victim pointed to one photograph and said that he had wrestled with that person on the night of the incident. (MH8;R18). The victim did not say that he knew the person in the photograph, or that he had any prior knowledge of that person. (MH8). He just pointed and said, "That's the person." (MH9). The victim did not tell the detective that he had seen the photograph before. (MH9). Detective Hyland did not assemble the photo array, and he did not know where the defendant's photograph was located in the array. (MH9). The single photograph provided by Mr. Hendrick to the victim and the eight-person photo array² were not admitted into evidence at the hearing. (R17,n.4;R18,n.6).

² After the defense rested, the prosecutor informed the court that he was not presenting evidence. (MH19-20). He stated, "[W]e have [] the eight-person photo array, but I don't think that's the issue in the case, as I understand it." (MH20). Defense counsel then stated that he agreed. (MH20). It is reasonable to infer that where the defendant did not make any claim of error regarding the construction and makeup of the photo array itself, the police did not use the cookout photograph in that array.

ARGUMENT

- I. THE JUDGE WAS NOT WARRANTED IN GRANTING THE DEFENDANT'S MOTION TO SUPPRESS WHERE THE JUDGE ERRONEOUSLY DEEMED THE VICTIM'S IDENTIFICATION, WHICH INVOLVED NO STATE ACTION, OF THE DEFENDANT FROM A SINGLE PHOTOGRAPH SHOWN TO THE VICTIM BY THE VICTIM'S COUSIN, "ESPECIALLY SUGGESTIVE" AND THEREFORE INADMISSIBLE AT TRIAL AND TAINTING ANY SUBSEQUENT IDENTIFICATIONS.

The Commonwealth is appealing from the judge's grant of the defendant's pre-trial motion to suppress the victim's identification of the defendant as the man who had broken into his house. The identification was initially made after the victim, acting without any government involvement, viewed a photograph of a suspected perpetrator provided by his cousin.

Insofar as the subsequent presentation of the photo array is concerned, the judge found that "the police did nothing in the presentation of the photographic array to violate the defendant's constitutional rights." (R18). Implicit in that finding is that the defendant did not meet his burden of showing, by a preponderance of the evidence, that in the totality of the circumstances, the eight-person photo array procedure was "so unnecessarily suggestive and conducive to irreparable mistaken identification as to deny the defendant due process of law."

Commonwealth v. Odware, 429 Mass. 231, 235 (1999) citing Commonwealth v. Otsuki, 411 Mass. 218, 232 (1991), quoting Commonwealth v. Venios, 378 Mass. 24, 26-27 (1979) (emphasis added).

Generally, as a matter of due process, a defendant is only entitled to suppression of an identification if the defendant shows that the State subjected the witness to unnecessarily suggestive identification procedures. Odware, supra at 235. The critical question under that standard is not whether the identification was or might be mistaken, but rather whether any possible mistake was attributable to improper procedures used by the Commonwealth or its agents. Commonwealth v. Colon-Cruz, 408 Mass. 533, 541 (1990) citing Commonwealth v. Paszko, 391 Mass. 164, 172 (1984) (emphasis added). After all, one of the primary purposes of the per se exclusionary rule under Article 12 is the deterrence of the use of suggestive identification procedures by the police. Commonwealth v. Johnson, 420 Mass. 458, 467-468 (1995).

Here, the cousin's act of showing the victim the surveillance photograph of the defendant did not involve the police or any agent of the Commonwealth,

and there was no indication that the police knew at that time that the cousin had any relevant information. "Where the suggestive circumstances do not arise from police activity, due process does not require exclusion of subsequent identification testimony." Odware, supra at 236 (identification not unnecessarily suggestive where witness's viewing of flyer containing defendant's picture did not result from "police contrivance or bungling"). Thus, where there was no governmental involvement in the initial identification, due process does not call for the suppression of the photo array identification. After all, there is no showing that the defendant's photograph used in the array even resembled the family photograph presented by his cousin. Commonwealth v. Johnson, 46 Mass. App. Ct. 398, (1999).

However, under common law principles, it has been recognized that "highly" and "especially suggestive" circumstances may also require exclusion of identification testimony. Odware, supra at 235-236. See Commonwealth v. Jones, 423 Mass. 99 (1996); Commonwealth v. Crayton, 470 Mass. 228, 235 (2014). "In some circumstances, an identification that has been tainted, but not by the government, may become so

unreliable that its introduction into evidence is unfair." Odware, supra at 236. For example, in Jones, the identifying witness had a brief opportunity to observe the defendant, who was African-American, at a motel where two of three perpetrators, who happened to be Vietnamese, were staying. The observation was made in circumstances where nothing particular was going on to focus her attention on the defendant. Subsequently, on two occasions (through no involvement by the Commonwealth) the victim happened to be in the courthouse during proceedings in the case where she was in the same room where the defendant was shackled to a Vietnamese man. The defendant was the only African-American in the courtroom on the first occasion and the victim and the defendant were together in the courtroom on that occasion for more than an hour. Jones, supra at 101-102, 105, 110. "Implicitly, the circumstances indicated that the prosecution thought the defendant had been involved in the crimes." Id. at 110. Under these circumstances, the witness's identification of the defendant was inadmissible.

The motion judge here relied on Jones. (R18). He then found, without further analysis, that not only

was the identification of the cousin's photo inadmissible, but also the separate identification through the photo array. (R19). He noted that the victim did not know the defendant and that the encounter was brief, and the victim "only" initially offered that the intruder was light-skinned and wore a gray hoodie. (R19). Without sufficient basis in the record, the judge concluded that the only reason the defendant as ever identified was that Mr. Hendrick gave the victim a photo of the defendant at a family cookout and told the victim that, based on his size and shape, he looked like the person who had broken into Mr. Hendrick's home the day before. (R19).

The judge's analysis was flawed. Under Jones, identification evidence may be inadmissible if the circumstances of the identification are shown to be to be so inherently unreliable that admission of the evidence would violate common law principles of fairness. Odware, supra at 236; Jones, supra at 109-110. The degree of suggestiveness required for exclusion under this theory is higher than that required for exclusion based on improper law enforcement procedures, since no possible deterrent effect is involved. The required degree of

suggestiveness was described as highly or especially suggestive circumstances. Id. at 109, 110. However, the Court has consistently indicated that identifications made "in otherwise neutral surroundings," such as through exposure to the media, are not so inherently suggestive and unreliable as to require exclusion. Jones, supra at 109-110; Commonwealth v. Sylvia, 456 Mass. 182, 190 (2010); Commonwealth v. Bly, 448 Mass. 473, 495 (2007); Commonwealth v. Horton, 434 Mass. 823, 835 (2001).

Contrary to the judge's position, the victim here viewed the photograph in "otherwise neutral surroundings." His cousin told him that his own home had been broken into, and that he thought the perpetrator might have been the defendant based on the defendant's "size and shape" as it appeared on a neighbor's surveillance video. The cousin did not in any way suggest that he himself had concluded that the defendant had to be the perpetrator. The victim viewed the family photograph of the defendant and concluded that it actually depicted the man with whom he had struggled in his apartment. The circumstances were neutral. This is not a situation where the victim would have felt pressured by his cousin to make

an identification. After all, any identification would not have any bearing on the cousin's case. The crimes were not even committed in the same county. Any conviction in the cousin's case would not depend in any way on the victim's identification of the defendant in the victim's own case. Further, there is no indication of any other basis for possible animosity on the part of the victim or the cousin towards the defendant.

The Commonwealth filed a motion for reconsideration before the judge, relying on Commonwealth v. Jules, 464 Mass. 478 (2013). (R21-24). The judge denied the motion on the papers with a margin notation, "Denied." (R25). However, the circumstances of the identification here were far less suggestive than those presented in Jules. In Jules, a witness testified at the defendant's trial that at 5:00 A.M. on the day the victim's body was discovered, she was delivering newspapers and saw a man walking near the location where the victim was found. Jules, supra at 488. Because it was unusual for her to see anyone on the street at that time, she mentioned the sighting to her husband. Id. Two days later, her husband asked whether she had seen the newspaper. Id.

The witness looked at the newspaper and recognized a picture of the defendant on the front page as the man she had seen on the road. Id. She contacted the police. Id.

The newspaper photograph depicted the defendant in handcuffs and the caption above the photograph read, "A brutal, horrific murder." Id. at 488, n.15. In much smaller print below the photograph, the text stated the defendant's name and that he was arraigned in court for the "vicious stabbing slaying of [the victim]." Id. On cross-examination, the witness testified about the short span of time in which she actually saw the defendant and the fact that she had seen him before dawn. Id. at 488. The witness testified that she did not remember reading the caption or any other words. Id.

The Court ruled that the degree of suggestiveness did not taint the identification to a degree requiring suppression. Id. at 490. There was no showing that the witness's memory of her original observations of the defendant was impaired, and the "confrontation" with the newspaper photograph occurred only two days after her original observations of the defendant. Id.

Thus, the facts were distinguishable from those in Jones. Id.

That was the situation here. In the case at bar, the victim viewed the single photograph provided by his cousin within six days of his struggle with the defendant. Further, the defendant here was not identified as the alleged perpetrator in the photograph as Jules was in Commonwealth v. Jules. Rather, the photograph was presented just to check a possibility that the defendant here might be the perpetrator. Additionally, there is no indication that the victim's memory of his original observations of the defendant was impaired. The judge's ruling that that single photograph identification and any subsequent identification must be barred was error. Thus, the single photograph identification should be deemed admissible, as well as the identification from the eight-person photo array.

In addition, the defendant did not claim, nor did he in any way establish at the hearing, that there was any flaw in the photo array itself. The defendant did not make any such claim in his motion to suppress. (R14-15). The defendant did not show that the picture used in the photo array even resembled the family

photograph presented by the cousin. Where the judge found that there was nothing wrong in the presentation of the photo array (implicitly finding it was not unnecessarily suggestive in the totality of the circumstances) there is nothing in the record supporting the conclusion that the photo array was tainted by the identification through the family photo. To the contrary, on the record here, the photo array procedures provided a separate and independent identification and basis for a subsequent in court identification. See Commonwealth v. Johnson, 46 Mass. App. Ct. 398 (1999).

In Johnson, a bank employee saw the defendant fleeing from a bank robbery. Id. at 399. She provided a description to the police and subsequently identified him in an eight-person photo array. Id. at 399-400. On appeal, the defendant argued that the employee's identification from the array was the result of her prior exposure to a composite sketch of the robber. Id. at 400. However, there was no testimony describing the sketch or how it was prepared, and the sketch was not introduced at the motion hearing. Id. As a result, the court held that Johnson did not meet his burden of showing error on

appeal. Id. This is instructive in the situation here.

The judge also erroneously suppressed any future in-court identification of the defendant by the victim. (R19-20). His analysis was insufficient, particularly where there is nothing in the record to support any conclusion that the photo array was tainted by the family photo identification. Where the Commonwealth has demonstrated that the judge's ruling on the single photograph identification and the eight-person array were erroneous, this ruling also cannot stand.

CONCLUSION

For the above stated reasons, the Commonwealth respectfully requests that the Court reverse the judge's decision granting the defendant's motion to suppress.

Respectfully submitted,

TIMOTHY J. CRUZ
District Attorney

BY: *Carolyn A. Burbine*
CAROLYN A. BURBINE
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For the Plymouth District
BBO # 566840

MARCH 6, 2015

COMMONWEALTH'S ADDENDUM

1. MA Declaration of Rights, Article 12.....A.1

Massachusetts Declaration of Rights, Article 12

No subject shall be held to answer for any crimes or offense, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself. And every subject shall have a right to produce all proofs, that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defence by himself, or his counsel, at his election. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land. And the legislature shall not make any law, that shall subject any person to a capital or infamous punishment, excepting for the government of the army and navy, without trial by jury.

COMMONWEALTH'S RECORD APPENDIX

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6.	Judge's Order Denying Motion to Reconsider in Margin Notation.....	R25
7.	Commonwealth's Notice of Appeal.....	R26
8.	Order Allowing Application for Interlocutory Appeal.....	R27
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10.	Appeals Court Docket No. 2014-P-1772.....	R31

**Commonwealth of Massachusetts
SUPERIOR COURT
Case Summary
Criminal Docket**

Commonwealth v Johnson, Kyle L

Details for Docket: PLCR2013-00104

Case Information

Docket Number:	PLCR2013-00104	Caption:	Commonwealth v Johnson, Kyle L
Entry Date:	03/11/2013	Case Status:	Criminal 1 - CtRm 1 (Brockton)
Status Date:	11/19/2014	Session:	Disposed: Entered in Appeals Court
Lead Case:	NA	Deadline Status:	Active since
Trial Deadline:	04/03/2013	Jury Trial:	NO

Parties Involved

2 Parties Involved in Docket: PLCR2013-00104

Party Involved:		Role:	Defendant
Last Name:	Johnson	First Name:	Kyle L
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City:	Mattapan	State:	MA
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Telephone:			

Party Involved:		Role:	Plaintiff
Last Name:	Commonwealth	First Name:	
Address:		Address:	
City:		State:	
Zip Code:		Zip Ext:	
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3 Attorneys Involved for Docket: PLCR2013-00104

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Firm Name:

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State: MA
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Tel Ext:
Representing: Johnson, Kyle L (Defendant)

Calendar Events

20 Calendar Events for Docket: PLCR2013-00104

No.	Event Date:	Event Time:	Calendar Event:	SES:	Event Status:
1	04/02/2013	09:00	Arraignment	1	Event held as scheduled
2	05/13/2013	09:00	Conference: Pre-Trial	1	Event held as scheduled
3	06/13/2013	09:00	Hearing: Discovery Motions	1	Event held as scheduled
4	07/26/2013	09:00	Hearing: Motion	1	Event held as scheduled
5	08/13/2013	09:00	Hearing: Motion	1	Event held as scheduled
6	08/15/2013	09:00	Hearing: Pre-Trial	1	Event rescheduled by court prior to date
7	09/06/2013	09:00	Hearing: Motion	1	Event not held--joint request



8	09/13/2013	09:00	Hearing: Motion	1	Event held as scheduled
9	10/30/2013	09:00	Hearing: Misc Matters	1	Event held as scheduled
10	12/17/2013	09:00	Hearing: Motion	1	Event held as scheduled
11	02/04/2014	09:00	Status: Review by Session	1	Event not held--joint request
12	02/04/2014	10:00	Conference: Lobby	4	Event canceled not re-scheduled
13	03/14/2014	09:00	Hearing: Motion	1	Event held as scheduled
14	05/08/2014	09:00	Hearing: Evidentiary-suppression	1	Event held--(ACTIVE) under advisement
15	06/16/2014	09:00	Status: Review by Session	1	Event held as scheduled
16	08/22/2014	09:00	Status: Review by Session	1	Event held as scheduled
17	11/14/2014	09:00	Status: Review by Session	1	Event held as scheduled
18	12/01/2014	09:00	Status: Review by Session	1	Event held as scheduled
19	02/25/2015	09:00	Status: Review by Session	1	Event held as scheduled
20	03/11/2015	09:00	Status: Review by Clerk	1	

Full Docket Entries

124 Docket Entries for Docket: PLCR2013-00104

Entry Date:	Paper No:	Docket Entry:
03/11/2013	1	Indictment returned
04/02/2013		Deft arraigned before Court
04/02/2013		Tracking deadlines Active since return date
04/02/2013		Scheduling order pursuant to standing order 2-86 amended.
04/02/2013	2	Notice of assignment of counsel.
04/02/2013	3	Appearance of Glover for the defendant.
04/02/2013	4	Appearance of Linehan for the Commonwealth.
04/02/2013		RE Offense 1:Plea of not guilty
04/02/2013		RE Offense 2:Plea of not guilty
04/02/2013		RE Offense 3:Plea of not guilty
04/02/2013		RE Offense 4:Plea of not guilty
04/02/2013		RE Offense 5:Plea of not guilty
04/02/2013		RE Offense 6:Plea of not guilty
04/02/2013		RE Offense 7:Plea of not guilty
04/02/2013		Ordered to recognize in the sum of \$150,000.00 cash without prejudice. (Gaziano, J.)
04/02/2013		Bail warning read.
04/02/2013	5	Case Tracking scheduling order (Gaziano, J.) mailed 4/2/2013
04/02/2013		Legal counsel fee assessed in the amount of \$ 150.00 (Gaziano, J.)
04/02/2013	6	Notice of unpaid counsel fees sent to Dept of Revenue and Registry of
04/02/2013	6	MV on (4/2/13)
04/02/2013	7	Special mittimus on indictment issued. (Gaziano, J.)

R3

04/02/2013		Case continued to May 13, 2013 by agreement for a pre-trial
04/02/2013		conference. (Gaziano, J.) R. Griffin, court reporter
04/02/2013		Case continued to August 15, 2013 by agreement for a pre-trial
04/02/2013		hearing. (Gaziano, J. R. Griffin, court reporter
04/17/2013		Special mittimus on indictment returned without service
05/13/2013	8	Pre-trial conference report filed
05/13/2013		Case continued to June 13,2013 for disclosure of alibi and hearing
05/13/2013		re: discovery motion(Moriarty,J) R.Griffin court reporter
06/13/2013		Case continued to July 26, 2013 by agreement for motion. (Moriarty,
06/13/2013		J.) JAVS
07/26/2013	9	MOTION by Deft: for funds allowed up to \$1500.00 for investigation
07/26/2013	9	report preparation and testimony at hearing of trial (Walker,J.) R.
07/26/2013	9	Griffin, court reporter
07/26/2013	10	MOTION by Commonwealth: to compel deoxyribonucleic acid (DNA) sample
07/26/2013		Case cont'd. to 8/13/13 by agreement for DNA motion (Walker,J.) R.
07/26/2013		Griffin, court reporter
08/13/2013		Case continued to September 6, 2013 by agreement for DNA motion.
08/13/2013		(Walker, J.) R. Griffin, court reporter
09/06/2013		Case continued to September 13,2013 by agreement for DNA
09/06/2013		motion(Walker,J) R.Griffin court reporter
09/11/2013	10	Habeas corpus for Deft at Suffolk House of Correction (South Bay) to
09/11/2013	10	appear September 13,2013 @ Brockton
09/13/2013		Commonwealth's motion #10 to compel deoxyribonucleic acid (DNA)
09/13/2013		sample, allowed. (Walker, J.)
09/13/2013	11	Court Order Re: (DNA) (Walker, J.)
09/13/2013	12	Deft's motion for probation records, allowed, no Commonwealth
09/13/2013	12	objection. (Walker, J.)
09/13/2013		Case continued to October 30, 2013 by agreement for filing motion.
09/13/2013		(Walker, J.) R. Griffin, court reporter
10/30/2013	13	MOTION by Deft: to suppress identification.
10/30/2013		Case continued to 12/17/13 by agreement re: motion to suppress.
10/30/2013		(Veary, J.) J. Russo, court reporter.
12/04/2013		Case continued to February 4,2014 for conference with Judge Ball
12/04/2013		fourth criminal session(Leo P Foley Asst Clerk)
12/16/2013	14	ORDER for dispositional conference scheduled for February 4,2014
12/16/2013	14	before Judge Ball at 10:00AM fourth criminal session(Leo P Foley Asst
12/16/2013	14	Clerk) copies mailed December 16,2013
12/16/2013	14	Habeas corpus for Deft at Suffolk House of Correction (South Bay) to
12/16/2013	14	appear December 17,2013 @ Brockton
12/17/2013	15	Defendant's MOTION for to continue; Filed and Allowed no objection
12/17/2013	15	from commonwealth(Veary,J) copies mailed December 18,2013
12/17/2013		Case continued to February 4, 2014 at request of the defendant

R 4

		(Veary,J) R Griffin court reporter
01/28/2014	16	Habeas corpus for Deft at Suffolk House of Correction (South Bay) to
01/28/2014	16	appear February 4,2014 @ Brockton
01/29/2014		Defendant declines dispositional conference case continued to
01/29/2014		February 4,2014 in first criminal session for status (Leo P Foley
01/29/2014		Asst Clerk)
02/04/2014		Case continued to March 14, 2014, by agreement for motion to
02/04/2014		suppress. (Gaziano, J) R. Griffin, Court Reporter
03/03/2014	17	Habeas corpus for Deft at Suffolk House of Correction (South Bay) to
03/03/2014	17	appear March 14,2014 @ Brockton
03/14/2014		case continued to May 8, 2014 by agreement for motion to suppress
03/14/2014		(Gaziano,J) R. Griffin, court reporter
05/08/2014		Hearing on (P#13 to suppress identification) held, matter taken under
05/08/2014		advisement (Cornelius Moriarty, Justice) R. Griffin, court reporter
05/08/2014	18	MOTION by Deft: for additional expenses filed; ALLOWED (Moriarty,J)
05/08/2014		Case continued to June 16,2014 by agreement for status (Moriarty,J)
05/08/2014		R. Griffin, court reporter
05/16/2014		MOTION (P#13 to suppress identification) allowed (see memorandum of
05/16/2014		decision) (Cornelius Moriarty, Justice).
05/16/2014	19	MEMORANDUM of Decision on defendants motion to suppress
05/16/2014	19	identification , ALLOWED (Cornelius Moriarty, Justice)
05/23/2014	20	Commonwealth's MOTION for reconsideration of defendant's motion to
05/23/2014	20	suppress (case given to Judge Moriarty)
05/28/2014		(P.#20) Deft.'s Motion For Reconsideration Of Deft.'s Motion To
05/28/2014		Suppress Denied. (Moriarty,J.).
06/06/2014	21	Notice of Interlocutory Appeal filed by Commonwealth in the SJC
06/16/2014		Case continued to August 22, 2014 by agreement re: status of appeal.
06/16/2014		(Moriarty, J.) R. Griffin, court reporter.
07/03/2014	22	ORDER (Allowing interlocutory Appeal) Clerk's Office shall assemble
07/03/2014	22	the record and transmit the record) ent: 7/1/14
07/11/2014	23	Court Reporter Griffin, Regina M. is hereby notified to prepare one
07/11/2014	23	copy of the transcript of the evidence of 05/08/2014
07/23/2014	24	Notice of assignment of counsel: CPCS
07/24/2014	25	Special Appearance of Deft's Atty: Edward Crane re: interlocutory
07/24/2014	25	appeal
08/22/2014		Case continued to 11/14/2014 by agreement for status of appeal
08/22/2014		(Ullmann, J) R Griffin Court Reporter
11/07/2014	26	Statement of the case on Appeal (Cover Sheet)
11/07/2014	27	Notice of completion of assembly of record sent to clerk of Appeals
11/07/2014	27	Court and attorneys for the Commonwealth and defendant.
11/07/2014		Trans, (CD sent to defense counsel
11/14/2014		Case continued to December 1, 2014 by agreement for status of appeal

R5

		(Cannone,J) C. Johnson, court reporter
11/19/2014	28	Notice of Entry of appeal received from the Appeals Court
11/26/2014	29	Defendant's MOTION to reduce bail pending resolution of
11/26/2014	29	commonwealth's interlocutory appeal
12/01/2014		Defendant's MOTION to reduce bail pending resolution of
12/01/2014		Commonwealth's Interlocutory appeal (P#29) allowed (Beverly J.
12/01/2014		Cannone, Justice).
12/01/2014		Defendant ordered to recognize in the amount of \$10,000.00 Cash
12/01/2014		without prejudice (Beverly J. Cannone, Justice)
12/01/2014		CONDITIONS: Stay away and no contact directly or indirectly with the
12/01/2014		victims (Beverly J. Cannone, Justice)
12/01/2014		Bail warning read
12/01/2014	30	Special mittimus on indictment issued
12/01/2014		Continued to 2/25/2015 for hearing on status (Beverly J. Cannone,
12/01/2014		Justice) R. Griffin, court reporter
12/05/2014		Special mittimus on indictment returned with service
02/25/2015		Case continued to March 11,2015 by agreement for status of appeal
02/25/2015		(Joseph M Walsh, ACM) R. Griffin, court reporter

Charges

7 Charges for Docket: PLCR2013-00104

No.	Charge Description:	Indictment:	Status:
1	POSSESS FIREARM WITHOUT F.I.D. CARD C 269, S 10(a)		Plea of not guilty
2	FIREARM CARRY WITH AMMUNITION c 269, s 10(n)		Plea of not guilty
3	FIREARM WITHOUT FID CARD, POSSESS c269 s10(h)		Plea of not guilty
4	FIREARM, DISCHARGE WITHIN 500 FT OF BLDG c269 s12E		Plea of not guilty
5	A&B WITH DANGEROUS WEAPON c265 s15A(b)		Plea of not guilty
6	B&E DAYTIME FOR FELONY, PERSON IN FEAR c266 s17		Plea of not guilty
7	ASSAULT IN DWELLING, ARMED c265 s18A		Plea of not guilty

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Rb

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, SS.

SUPERIOR COURT DEPARTMENT

INDICTMENT NO. 13-00104-001

COMMONWEALTH

VS.

KYLE L. JOHNSON

INDICTMENT
UNLAWFUL POSSESSION OF A FIREARM
GENERAL LAWS CHAPTER 269, SECTION 10(a)

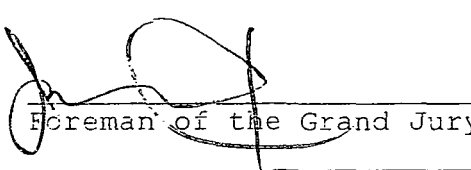
At the SUPERIOR COURT, begun and holden at BROCKTON, within and
for the COUNTY of PLYMOUTH, on MARCH 8, 2013 ,


THE JURORS for the Commonwealth of Massachusetts on their oath
present that:

KYLE L. JOHNSON

of BOSTON in the COUNTY of SUFFOLK, on or about SEPTEMBER 21, 2012, at
BROCKTON in the COUNTY of PLYMOUTH, not having permission under
Sections 131 or 131F of Chapter 140 of the General Laws of
Massachusetts and without complying with the provisions of Sections
129C and 131G of said Chapter 140, did knowingly and unlawfully have
in his possession, or under his control, a firearm. to wit: A HANDGUN,
from which a bullet could be discharged, the length of the barrel of
said firearm being less than sixteen inches, in violation of Chapter
269, Section 10(a) of the Massachusetts General Laws.

A TRUE BILL



Foreman of the Grand Jury


Assistant District Attorney

RETURN

PLYMOUTH, SS. On this 11th day of March , 2013, this
indictment was returned and presented to said Superior Court by the
Grand Jury, and ordered to be filed and filed.

ATTEST:


Assistant Clerk

R7

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, SS.

SUPERIOR COURT DEPARTMENT
INDICTMENT NO. 13-00104-002

COMMONWEALTH

VS.

KYLE L. JOHNSON

INDICTMENT
UNLAWFUL POSSESSION OF A LOADED FIREARM
GENERAL LAWS CHAPTER 269, SECTION 10(n)

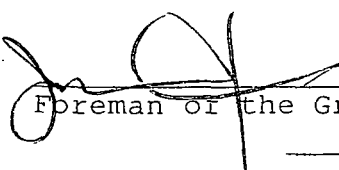
At the SUPERIOR COURT, begun and holden at BROCKTON, within and
for the COUNTY of PLYMOUTH, on MARCH 8, 2013 ,


THE JURORS for the Commonwealth of Massachusetts on their oath
present that:

KYLE L. JOHNSON

of BOSTON in the COUNTY of SUFFOLK, on or about SEPTEMBER 21, 2012, at
BROCKTON in the COUNTY of PLYMOUTH, did violate paragraph(a) or
paragraph(c), of Chapter 269, Section 10 of the General Laws of
Massachusetts, by means of a loaded firearm, loaded sawed-off shotgun
or loaded machine gun.

A TRUE BILL



Foreman of the Grand Jury


Assistant District Attorney

RETURN

PLYMOUTH, SS. On this 11th day of March , 2013, this
indictment was returned and presented to said Superior Court by the
Grand Jury, and ordered to be filed and filed.

ATTEST:


Assistant Clerk

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, SS.

SUPERIOR COURT DEPARTMENT
INDICTMENT NO. 13-00104-003

COMMONWEALTH

VS.

KYLE L. JOHNSON

INDICTMENT
UNLAWFUL POSSESSION OF AMMUNITION
WITHOUT FIREARM IDENTIFICATION CARD
GENERAL LAWS CHAPTER 269, SECTION 10(h)

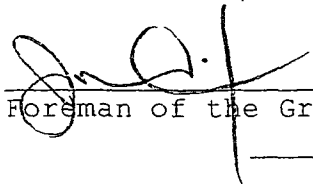
At the SUPERIOR COURT, begun and holden at BROCKTON, within and
for the COUNTY of PLYMOUTH, on MARCH 8, 2013 ,

THE JURORS for the Commonwealth of Massachusetts on their oath
present that:

KYLE L. JOHNSON

of BOSTON in the COUNTY of SUFFOLK on or about SEPTEMBER 21, 2012, at
BROCKTON in the COUNTY of PLYMOUTH, did own or possess or transfer
possession of ammunition without complying with the requirements
relating to the firearms identification card provided for in Section
129C of Chapter 140 of the General Laws.

A TRUE BILL


Foreman of the Grand Jury


Assistant District Attorney

RETURN

PLYMOUTH, SS. On this 11th day of March , 2013, this
indictment was returned and presented to said Superior Court by the
Grand Jury, and ordered to be filed and filed.

ATTEST:


Assistant Clerk

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, SS.

SUPERIOR COURT DEPARTMENT

INDICTMENT NO. 13-00104-004

COMMONWEALTH

VS.

KYLE L. JOHNSON

INDICTMENT

UNLAWFUL DISCHARGE OF FIREARM WITHIN 500 FEET OF BUILDING
GENERAL LAWS CHAPTER 269, SECTION 12E

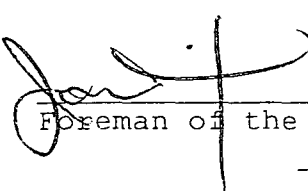
At the SUPERIOR COURT, begun and holden at BROCKTON, within and
for the COUNTY of PLYMOUTH, on MARCH 8, 2013 ,


THE JURORS for the Commonwealth of Massachusetts on their oath
present that:

KYLE L. JOHNSON

of BOSTON in the COUNTY of SUFFOLK, on or about SEPTEMBER 21, 2012, at
BROCKTON in the COUNTY of PLYMOUTH, did discharge a firearm as defined
in Chapter 140, Section 121 of the General Laws, a rifle or shotgun
within 500 feet of a dwelling or other building in use, without the
consent of the owner or legal occupant thereof.

A TRUE BILL

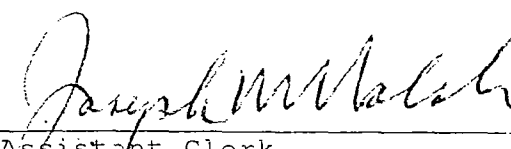

Foreman of the Grand Jury


Assistant District Attorney

RETURN

PLYMOUTH, SS. On this 11th day of March , 2013, this
indictment was returned and presented to said Superior Court by the
Grand Jury, and ordered to be filed and filed.

ATTEST:


Assistant Clerk

R10

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, SS.

SUPERIOR COURT DEPARTMENT
INDICTMENT NO. 13-00104-005

COMMONWEALTH

VS.

KYLE L. JOHNSON

INDICTMENT

ASSAULT AND BATTERY BY MEANS OF A DANGEROUS WEAPON
GENERAL LAWS CHAPTER 265, SECTION 15A(b)

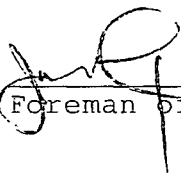
At the SUPERIOR COURT, begun and holden at BROCKTON, within and
for the COUNTY of PLYMOUTH, on MARCH 8, 2013 ,

THE JURORS for the Commonwealth of Massachusetts on their oath
present that:

KYLE L. JOHNSON

of BOSTON in the COUNTY of SUFFOLK, on or about SEPTEMBER 21, 2012,
at BROCKTON in the COUNTY of PLYMOUTH, did assault and beat
ADEBAYO TALABI by means of a dangerous weapon, to wit: A GUN.

A TRUE BILL



Foreman of the Grand Jury

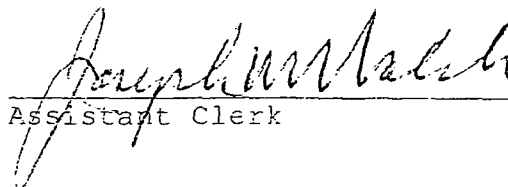


Assistant District Attorney

RETURN

PLYMOUTH, SS. On this 11th day of March , 2013, this
indictment was returned and presented to said Superior Court by the
Grand Jury, and ordered to be filed and filed.

ATTEST:



Assistant Clerk

R11

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, SS.

SUPERIOR COURT DEPARTMENT
INDICTMENT NO. *13-00104-006*

COMMONWEALTH

VS.

KYLE L. JOHNSON

INDICTMENT
BREAKING AND ENTERING IN THE DAYTIME
(Person Put In Fear)
GENERAL LAWS CHAPTER 266, SECTION 17

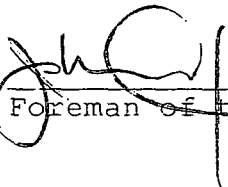
At the SUPERIOR COURT, begun and holden at BROCKTON, within and
for the COUNTY of PLYMOUTH, on MARCH 8, 2013 ,

THE JURORS for the Commonwealth of Massachusetts on their oath
present that:

KYLE L. JOHNSON

of BOSTON in the COUNTY of SUFFOLK, on or about SEPTEMBER 21, 2012, at
BROCKTON in the COUNTY of PLYMOUTH, did break and enter in the daytime
the building, ship, vessel, or vehicle of ADEBAYO TALABI with
intent therein to commit a felony, and did put in fear the said
ADEBAYO TALABI, a person lawfully therein.

A TRUE BILL

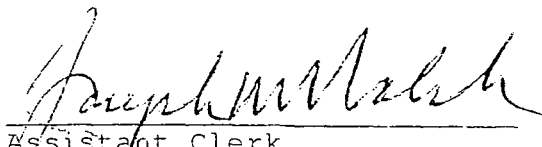

Foreman of the Grand Jury


Assistant District Attorney

RETURN

PLYMOUTH, SS. On this *11th* day of *March*, 2013, this
indictment was returned and presented to said Superior Court by the
Grand Jury, and ordered to be filed and filed.

ATTEST:


Assistant Clerk

R12

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, SS.

SUPERIOR COURT DEPARTMENT
INDICTMENT NO. 13-00104-007

COMMONWEALTH

VS.

KYLE L. JOHNSON

INDICTMENT
ARMED ASSAULT IN A DWELLING
GENERAL LAWS CHAPTER 265, SECTION 18A

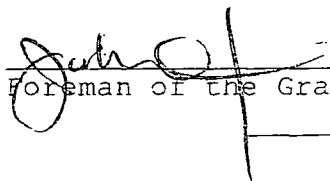
At the SUPERIOR COURT, begun and holden at BROCKTON, within and
for the COUNTY of PLYMOUTH, on MARCH 8, 2013 ,

THE JURORS for the Commonwealth of Massachusetts on their oath
present that:

KYLE L. JOHNSON

of BOSTON in the COUNTY of SUFFOLK, on or about SEPTEMBER 21, 2012, at
BROCKTON in the COUNTY of PLYMOUTH, being armed with a dangerous
weapon, to wit: A GUN, did enter the dwelling house of ADEBAYO TALABI
and while therein did assault ADEBAYO TALABI with intent to commit a
felony.

A TRUE BILL


Foreman of the Grand Jury


Assistant District Attorney

RETURN

PLYMOUTH, SS. On this 11th day of March , 2013, this
indictment was returned and presented to said Superior Court by the
Grand Jury, and ordered to be filed and filed.

ATTEST:


Assistant Clerk

R13

13

OCT 30 2013

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, ss.

SUPERIOR COURT DEP'T
CRIMINAL NO.

COMMONWEALTH

v.

KYLE JOHNSON,
Defendant

FILED
COMMONWEALTH OF MASSACHUSETTS
SUPERIOR COURT DEPT. OF THE TRIAL COURT
PLYMOUTH COUNTY
OCT 30 2013
[Signature]
Clerk of Court

DEFENDANT'S MOTION TO SUPPRESS IDENTIFICATION

Now comes the defendant in the above-entitled action and hereby respectfully moves this Honorable Court, pursuant to Rule 13 of the Massachusetts Rules of Criminal Procedure, to order the suppression of all in-court and out-of-court identification of the defendant by the Commonwealth witness(es).

As reasons therefor, the defendant states that the photographic array or other procedure at which the defendant was identified was the result of procedures so impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification. These actions were in violation of rights guaranteed by the Fourth, Fifth and Fourteenth Amendments to the U.S. Constitution and by Article 12 of the Massachusetts Declaration of Rights. *Commonwealth v. Botelho*, 369 Mass. 860, 343 N.E.2d 876 (1976). The suggestive and illegal identification procedure has tainted all subsequent identifications. *Commonwealth v. Botelho*, 369 Mass. at 868, 343 N.E.2d at 880. It is further stated that the identification resulted in an arrest made without probable cause.

The defendant requests an evidentiary hearing on this motion.

Respectfully submitted,
THE DEFENDANT
By his Attorney,

[Signature]
Thomas R. Glove
BBO #195680
273 Hanover Street - Ste. 15
Hanover, MA 02339
781-829-5001

May 8, 2014
under advisement
May 16, 2014
allowed

(see memorandum of decision)

[Signature]
Attorney General
and Clerk
R14

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, ss.

SUPERIOR COURT DEP'T
TRIAL DIVISION
CRIM NO.: 13-104

COMMONWEALTH

v.

KYLE JOHNSON

**AFFIDAVIT OF COUNSEL IN SUPPORT OF MOTION TO SUPPRESS
IDENTIFICATION**

I, Thomas R. Glover, do hereby depose and state that:

1. I was appointed as the attorney to represent the defendant.
2. I have been supplied by discovery documents by the Commonwealth.
3. During my perusal of these documents, including but not limited to, the Grand Jury minutes, I discovered that the alleged victim in this matter was shown a photo of the defendant by a friend or cousin prior to his being shown a photo array with the defendant's photo contained therein.
4. The alleged victim gave the impression that he picked the defendant out without prior knowledge of his identity.
5. In fact, the victim had already been shown a photo of the defendant.

Sworn to under the pains and penalties of perjury this

30th day of October 2013



Thomas R. Glover
BBO #195680

R 15

Red
5-16-14

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, SS.

SUPERIOR COURT
NO.13-104

COMMONWEALTH

v.

KYLE JOHNSON,
Defendant

**MEMORANDUM OF DECISION ON DEFENDANT'S MOTION TO SUPPRESS
IDENTIFICATION.**

The defendant, Kyle Johnson (Johnson) stands indicted on a seven count indictment charging him with unlawful possession of a firearm, unlawful possession of a loaded firearm, unlawful possession of ammunition, discharge of a firearm within 500 feet of a building, assault and battery with a dangerous weapon, breaking and entering in the daytime and armed assault in a dwelling. He filed a motion to suppress all in-court and out of court identifications made of him by the Commonwealth witnesses. The defendant claims that the photographic array or other procedure at which the defendant was in identified was the result of procedures so impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification and that the identification was obtained in violation of the Fourth, Fifth and 14th Amendments to the United States Constitution and by Article 12 of the Massachusetts Declaration of Rights

An evidentiary hearing was held on May 8, 2014, at which two witnesses testified. Based upon the credible evidence and the reasonable inferences drawn therefrom, the following findings of fact are made.

FINDINGS OF FACT

On September 21, 2012, Adebayo Talabi (Talabi) received a call from his upstairs

RIL

A TRUE COPY ATTEST

[Signature]
Clerk of Courts

cc 5/16/14

neighbor that the door to his apartment was open. When he entered his home, he encountered a male, armed with a firearm, whom he did not recognize. A struggle ensued. During the struggle, the gun went off and the intruder fled. Talabi reported the incident to the police and described the intruder as a light skinned,¹ black male wearing a gray hooded sweatshirt. Detective Jacqueline Congdon (Congdon) asked Talabi to come down to the police station to view a photo array but Talabi, for one reason or another, did not.

On September 27, 2012, Talabi contacted Brockton Police Officer Scott Besarick and told him he now knew the identity of the intruder. Talabi then spoke to Congdon and told her that he had been speaking with his cousin, T.J. Hendricks (Hendricks) who lived in Roxbury. Hendricks told Talabi that his home had been broken into on September 20, 2012. Hendricks told Talabi (and Congdon)² that the break into his home had been captured on a neighbor's surveillance system. Hendricks said that from the size and shape of the intruder on the video³ that the perpetrator could possibly be another cousin's, Jante Hendricks (Jante) boyfriend (the defendant). Hendricks did not provide a physical description of the intruder to Congdon. He did tell Congdon that he had procured a photograph of the defendant with Jante which was taken at a cookout the previous summer and forwarded it to Talabi. Talabi viewed the photograph^{4 5} and identified the defendant as the person who entered his home. Congdon put together an eight person photo

¹ Having seen the defendant at the evidentiary hearing, I would not characterize him as light skinned.

² Congdon, Talabi and Hendrick discussed the situation together in a three way call.

³ For reasons unknown to the Court, the police did not obtain a copy of the video.

⁴ This photograph was not submitted to the court.

⁵ Neither Talabi or Hendricks testified at the evidentiary hearing.

R17

array,⁶ which included the defendant. Detective Thomas Hyland showed the array to Talabi at a local restaurant. Upon being shown the photo array, Talabi positively identified the defendant as the culprit.

DISCUSSION

Under art. 12 of the Massachusetts Declaration of Rights, an out-of-court eyewitness identification is not admissible where the defendant proves by a preponderance of the evidence, considering the totality of the circumstances, that the identification is so unnecessarily suggestive and conducive to irreparable misidentification that its admission would deprive the defendant of his right to due process. See *Commonwealth v. Johnson*, 420 Mass. 458, 463-464 (1995); *Commonwealth v. Thomley*, 406 Mass. 96, 98 (1989). See also *Commonwealth v. Silva-Santiago*, 453 Mass. 782, 794-795 (2009) (*Silva-Santiago*).

As an initial matter, based on the sparse evidentiary record, I find that the police did nothing in the presentation of the photographic array to violate the defendant's constitutional rights.⁷ However in *Commonwealth v. Jones*, 423 Mass. 99 (1996) the Supreme Judicial Court, recognized that common-law principles of fairness dictate that an unreliable identification arising from "especially suggestive circumstances" should not be admitted in evidence even where the police were not responsible for the suggestive confrontation. *Id.* at 108-109. See *Commonwealth v. Odware*, 429 Mass. 231, 236 (1999) ("in some circumstances an identification that has been tainted, but not by the government, may become so unreliable that its introduction into evidence is unfair").

⁶ The eight person photo array was not submitted to the court.

⁷ There was no evidence one way or another as to whether Detective Hyland conducted the identification procedure in accordance with the protocol adopted in *Silva-Santiago*, supra.

R18

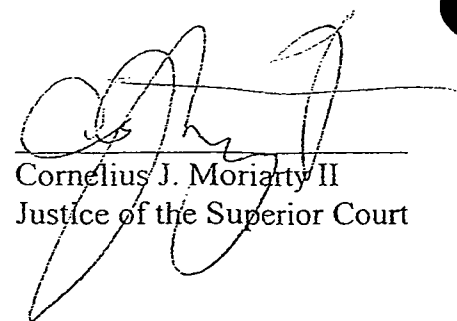
"Eyewitness identification of a person whom the witness had never seen before the crime or other incident presents a substantial risk of misidentification and increases the chance of a conviction of an innocent defendant." *Commonwealth v. Jones*, 423 Mass. 99, 109 (1996)

Here the evidence establishes that Talabi did not know the defendant. The evidence also suggests that the encounter was brief as the only description Talabi could offer was that the intruder was light skinned and wearing a grey hoodie. There is no evidence that Talabi provided any other identifying characteristics such as the perpetrator's height, weight or facial hair. The defendant was only identified after Hendricks provided a photograph to Talabi and telling him that the defendant, by his size and shape, looked like the person who had broken into his house the day before. Under the facts here, I find that both of the out-of- court photographic identifications of the defendant were impermissibly tainted by the suggestive circumstances. W206

For the in-court identification to be admissible, it is the Commonwealth's burden to establish by clear and convincing evidence, that it is based upon an independent source. See *Commonwealth v. Botelho*, 369 Mass. 860, 868 (1976). Whether the Commonwealth meets its burden is a question of fact. *Commonwealth v. Roberts*, 362 Mass. 357, 364 (1972). When considering whether an independent source exists, typically the most important factor is the extent of the witness's opportunity to observe the defendant at the time of the crime. *Commonwealth v. Botev*, 79 Mass. App. Ct. 281 (2011). Here, there was no evidence presented as to the length of Talabi's encounter with the intruder, the lighting conditions in the apartment, the relative positions of the combatants during the struggle or Talabi's emotional condition. Accordingly, the Commonwealth has failed to sustain its burden to establish by clear and convincing evidence that an in court identification is based upon an independent source. As a result, the defendant's motion to suppress both the two out-of- court identifications and the in-court identification of the

defendant by Talabi is **ALLOWED**.

May 16, 2014



Cornelius J. Moriarty II
Justice of the Superior Court

R20

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, ss.

SUPERIOR COURT DEPARTMENT
BROCKTON SUPERIOR COURT
PLCR2013-00104

COMMONWEALTH

v.

KYLE JOHNSON

**COMMONWEALTH'S MOTION FOR RECONSIDERATION OF
DEFENDANT'S MOTION TO SUPPRESS**

The Commonwealth respectfully moves this Court to reconsider its order suppressing the out of court photographic identification made in this case.

As grounds therefore the Commonwealth states as follows:

In the Commonwealth, as a matter of due process guaranteed by Article 12 of the Massachusetts Declaration of Rights, a defendant is entitled to suppression of an identification if the defendant shows that the State subjected the witness to such unnecessarily suggestive identification procedures as to deny the defendant due process of law. Commonwealth v. Odware, 429 Mass. 231, 235 (1999). The critical question under that standard is not whether the identification was or might be mistaken but rather whether any possible mistake was attributable to improper procedures used by the Commonwealth or its agents. Colon-Cruz, supra at 541; Commonwealth v. Paszko, 391 Mass. 164, 172 (1984). After all, one of the primary purposes of the per se exclusionary rule under article 12 is the deterrence

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of the use of suggestive identification procedures by the police. Commonwealth v. Johnson, 420 Mass. 458, 467-468 (1995).

In this case, the witness, Adebayo Talabi, first identified the defendant as the man he saw and struggled with in his apartment, when he was shown a photograph of the defendant by his cousin T.J. Hendricks. Nothing in the record indicates that the police or any agent of the Commonwealth had any involvement in that identification process, or that the police had any indication at that time that the Mr. Talabi might be in possession of any relevant information. “Where the suggestive circumstances do not arise from police activity, due process does not require exclusion of subsequent identification testimony.” Odware, supra at 236.

However, common law principles, recognized by this Court in Commonwealth v. Jones, 423 Mass. 99 (1996), may also require exclusion of identification testimony in particular circumstances. Odware, supra at 235. It is on that second theory the Court has relied upon in allowing this motion to suppress. Under this theory, identification evidence may be inadmissible if the circumstances of the identification are shown to be so inherently unreliable that its admission would violate common law principles of fairness. Odware, supra at 236; Jones, supra at 109-110.

The degree of suggestiveness required for exclusion under this theory is higher than that required for exclusion based on improper law enforcement procedures (as no possible deterrent effect is involved). In Jones, the required degree of suggestiveness was described as “highly” or “especially” suggestive

circumstances. Id. at 109. The Supreme Judicial Court has consistently indicated that identifications made in otherwise neutral surroundings, such as through exposure to the media, are not so inherently suggestive and unreliable as to require exclusion. Id. at 109-110; Commonwealth v. Sylvia, 456 Mass. 182, 190 (2010); Commonwealth v. Bly, 448 Mass. 473, 495 (2007); Commonwealth v. Horton, 434 Mass. 823, 835 (2001).

In Commonwealth v. Jules, 464 Mass. 478 (2013) the witness was shown a lone photograph in a newspaper in which the defendant appeared in handcuffs with a headline above the photograph stating “A brutal horrific murder”. Even with that exposure the SJC stated, “While we agree with the defendant that determinations under the common law regarding the admissibility of pretrial out-of-court identifications do not turn solely on whether government agents were involved in the identification, we find the facts of this case to be distinguishable from those in Commonwealth v. Jones, *supra*. ... and the jury were capable of making an informed assessment of the accuracy of the witness’s identification and assessing the weight, aided by ...cross examination and the judge’s instructions.” (at pg. 11 of attached copy)

It is well-established that exposure to a defendant’s picture through the media does not provide grounds for exclusion. As the trial judge recognized, exposure to a defendant’s picture in the media is not enough to require the exclusion of identification testimony. The present case is a particularly inappropriate case for any revision of the general rule because nothing in the

record indicates that the circumstances of the identification were "especially suggestive."

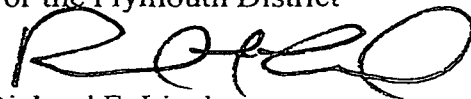
While it is true that eyewitness identification can be mistaken, jurors can be expected to be aware of that possibility as a matter of both personal and common experience. Where an otherwise uninvolved witness makes an identification through the defendant's picture in the media [or a one on one show up photograph], it is well within a juror's ability to assess the circumstances and determine the weight and credibility that testimony deserves. Odware, supra at 236.

CONCLUSION.

For the foregoing reasons, the Commonwealth respectfully requests that this Court deny the defendant's motion for a new trial.

Respectfully submitted
FOR THE COMMONWEALTH,

TIMOTHY CRUZ
District Attorney
For the Plymouth District



Richard F. Linehan
Assistant District Attorney
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(508) 584-8120

May 22, 2014

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3/23/14

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COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, ss.

SUPERIOR COURT DEPARTMENT
BROCKTON SUPERIOR COURT
PLCR2013-00104

COMMONWEALTH

v.

KYLE JOHNSON

FILED

COMMONWEALTH OF MASSACHUSETTS
SUPERIOR COURT DEPARTMENT
BROCKTON SUPERIOR COURT
PLCR2013-00104

MAR 23 2014

[Signature]
Clerk of Courts

COMMONWEALTH'S MOTION FOR RECONSIDERATION OF
DEFENDANT'S MOTION TO SUPPRESS

The Commonwealth respectfully moves this Court to reconsider its order suppressing the out of court photographic identification made in this case.

As grounds therefore the Commonwealth states as follows:

In the Commonwealth, as a matter of due process guaranteed by Article 12 of the Massachusetts Declaration of Rights, a defendant is entitled to suppression of an identification if the defendant shows that the State subjected the witness to such unnecessarily suggestive identification procedures as to deny the defendant due process of law. Commonwealth v. Odware, 429 Mass. 231, 235 (1999). The critical question under that standard is not whether the identification was or might be mistaken but rather whether any possible mistake was attributable to improper procedures used by the Commonwealth or its agents. Colon-Cruz, supra at 541; Commonwealth v. Paszko, 391 Mass. 164, 172 (1984). After all, one of the primary purposes of the per se exclusionary rule under article 12 is the deterrence

5/28/14

[Signature]

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CC: DA
TL

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, SS

SUPREME JUDICIAL COURT
SINGLE JUSTICE NO.
PLYMOUTH SUPERIOR COURT
No. PLCR2013-00104

COMMONWEALTH

V.

KYLE JOHNSON


NOTICE OF APPEAL
APPLICATION TO A SINGLE JUSTICE PURSUANT TO
MASS. R. CRIM. P. 15(a)(2)

Now comes the Commonwealth and notifies the Court
and the Defendant of the Commonwealth's application for
leave to appeal pursuant to Massachusetts Rule of
Criminal Procedure 15(a)(2).

Respectfully submitted,

TIMOTHY J. CRUZ
District Attorney

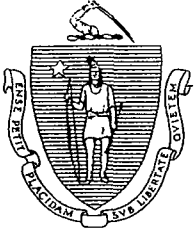
BY:


RICHARD F. LINEHAN
Assistant District Attorney
Plymouth District

DATED:

6/6/14

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MAURA S. DOYLE
CLERK

The Commonwealth of Massachusetts
SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
JOHN ADAMS COURTHOUSE
ONE PEMBERTON SQUARE, SUITE 1300
BOSTON, MASSACHUSETTS 02108-1707
WWW.SJCCOUNTYCLERK.COM

PLYMOUTH COUNTY
DISTRICT ATTORNEY

JUL 07 2014

CASE INFORMATION (617) 557-1100
FACSIMILE (617) 557-1117
ATTORNEY SERVICES (617) 557-1050
FACSIMILE (617) 557-1055

July 1, 2014

Richard F. Linehan, Assistant District Attorney
Office of the District Attorney/Plymouth
32 Belmont Street
P.O. Box 1665
Brockton, MA 02303

RE: No. SJ-2014-0226

COMMONWEALTH
vs.
KYLE JOHNSON

Plymouth Superior Court
No. PLCR2013-00104

NOTICE OF DOCKET ENTRY

You are hereby notified that on July 1, 2014, the following was
entered on the docket of the above referenced case:

ORDER: Interlocutory appeal allowed; to Appeals Court. (Cordy, J.)


Maura S. Doyle, Clerk

To: Richard F. Linehan, Assistant District Attorney
Thomas R. Glover, Esquire
Plymouth Superior Court
Appeals Court / Comm. of Mass.

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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
No. SJ-2014-0226

Plymouth Superior Court
No. PLCR2013-00104

COMMONWEALTH

vs.

KYLE JOHNSON

ORDER ALLOWING APPLICATION
FOR INTERLOCUTORY APPEAL

This matter came before the Court, Cordy, J., on the Commonwealth's application for leave to file interlocutory appeal pursuant to Mass. R. Crim. P. 15(a)(2), of a Trial Court judge's allowance of a motion to suppress evidence filed on June 9, 2014.

The Commonwealth's application is deemed timely filed.

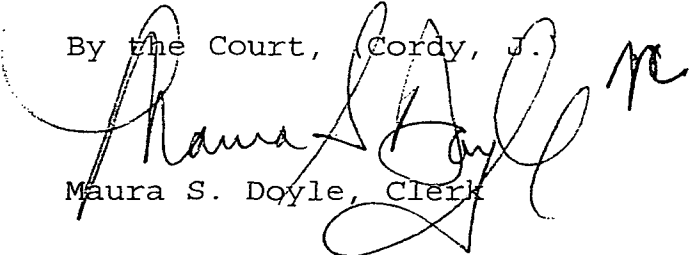
Upon consideration, it is ORDERED that the application for interlocutory appeal be, and the same hereby is, allowed.

It is FURTHER ORDERED that the interlocutory appeal shall proceed in the Appeals Court and that the Criminal Clerk's Office of the Plymouth Superior Court shall assemble the record in PLCR2013-00104 and transmit the record to the Clerk's Office

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of the Appeals Court, John Adams Courthouse, One Pemberton
Square, Room 1-200, Boston, Massachusetts 02108-1705.

By the Court, (Cordy, J.)


Maura S. Doyle, Clerk

Entered: July 1, 2014

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Supreme Judicial Court and Appeals Court of Massachusetts

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Lower Court Judge

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SUPREME JUDICIAL COURT

for Suffolk County

Case Docket

COMMONWEALTH vs. KYLE JOHNSON

SJ-2014-0226

CASE HEADER

Case Status	Interlocutory appeal allowed	Status Date	07/01/2014
Nature	Lv for interloc appeal	Entry Date	06/09/2014
Sub-Nature	Mot to Suppress	Single Justice	
TC Ruling	Mot to Suppress allowed	TC Ruling Date	05/28/2014
SJ Ruling		TC Number	
Pet Role Below	Plaintiff in lower court	Full Ct Number	
Lower Court	Plymouth Superior Court	Lower Ct Judge	Cornelius J. Moriarty, II, J.

INVOLVED PARTY

Commonwealth
Plaintiff/Petitioner

Kyle Johnson
Defendant/Respondent

ATTORNEY APPEARANCE

Richard F. Linehan, Assistant District Attorney

Thomas R. Glover, Esquire

DOCKET ENTRIES

Entry Date	Paper	Entry Text
06/09/2014		Case entered.
06/09/2014	#1	Application to a Single Justice Pursuant to Mass. R. Crim. P. 15(A)(2) filed by ADA Richard F. Linehan, with Appendix and Certificate of Service.
06/30/2014	#2	Defendant's Motion For Leave To File Late Opposition Memorandum To The Commonwealth's Application To Single Justice filed by Atty Thomas Glover.
07/01/2014	#3	ORDER: Interlocutory appeal allowed; to Appeals Court. (Cordy, J.)
07/01/2014	#4	Notice to counsel/parties, regarding paper #3 filed.

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As of 07/02/2014 02:01

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Lower Court

Lower Court Judge

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APPEALS COURT

Panel Cases
Case Docket
COMMONWEALTH vs. KYLE L. JOHNSON

2014-P-1772

CASE HEADER

Case Status	No briefs yet	Status Date	11/14/2014
Nature	Crime: Possession of Gun	Entry Date	11/14/2014
Sub-Nature	Interlocutory Appeal	SJ Number	
Appellant	Plaintiff	Case Type	Criminal
Brief Status	Awaiting blue brief	Brief Due	02/27/2015
Panel		Argued/Submitted	
Citation		Decision Date	
Lower Court	Plymouth Superior Court	TC Number	
Lower Ct Judge	Cornelius J. Moriarty, II, J.	TC Entry Date	03/11/2013
FAR Number		SJC Number	

INVOLVED PARTY

Commonwealth
Plaintiff/Appellant
Awaiting blue brief
1 Extension, 65 Days

Kyle L. Johnson
Defendant/Appellee
Awaiting red brief

ATTORNEY APPEARANCE

Robert C. Thompson, A.D.A.
Withdrawn
Carolyn A. Burbine, A.D.A.

Edward Crane, Esquire
Thomas R. Glover, Esquire

DOCKET ENTRIES

Entry Date	Paper	Entry Text
11/14/2014		Transcripts received: NONE
11/14/2014	#1	Entered.
11/14/2014		Notice of entry sent.
11/26/2014	#2	Docketing Statement received from Kyle L. Johnson^.
12/17/2014	#3	Notice of appearance of Carolyn A. Burbine for Commonwealth.
12/26/2014	#4	MOTION to extend brief & appendix due date, filed by Commonwealth.
12/29/2014		RE#4: Allowed to 02/27/2015. Notice sent.

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As of 12/31/2014 02:01


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CERTIFICATE PURSUANT TO MASS. R. APP. P. 16(k)

I, Carolyn A. Burbine, do hereby certify that the Commonwealth's brief in the case of Commonwealth v. Kyle Johnson, Appeals Court No. 2014-P-1722, complies with Mass. R. App. P. 16(k).



Carolyn A. Burbine
Assistant District Attorney
For the Plymouth District

Date: March 6, 2015